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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-204

LOLA RABON,
Petitioner,

v.

GUARDSMARK, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1978

No. ———

LOLA RABON,

Petitioner,

v.

GUARDSMARK, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-styled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 571 F.2d 1277 and is appended hereto at 1a, Appendix A. The denial of the petition for rehearing and suggestion for rehearing *en banc* is appended hereto at 12a, Appendix B. The transcript of the oral opinion of the United States District Court for the District of South Carolina is unreported and is appended hereto at 14a, Appendix C.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on February 16, 1978. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 14, 1978. By order of Mr. Justice Brennan, acting in the absence of the Chief Justice, the time for petitioning for a writ of certiorari to review the judgment below was extended to and including August 4, 1978. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the majority of the panel of the appellate court err in refusing to accord weight to the district judge's determination of state law questions in this diversity case, and in reversing that district judge's determination without finding that his interpretation was clearly wrong?

2. Did the majority below err in failing to apply the state law as it existed at the time of the appellate decision, where it expressly relied on a decision that had been virtually overruled after the district court's judgment?

STATEMENT OF THE CASE

Petitioner brought this tort action in the federal district court, founding jurisdiction in this diversity action on 28 U.S.C. § 1332. The action sought recovery from the private security agency that employed a security guard who raped petitioner at gunpoint while on duty.

On Sunday, January 19, 1975, petitioner was on duty at the Hewitt-Robins plant along with her supervisor. A security guard, Melvin T. Roberts, had been assigned by Guardsmark and was on duty to protect the plant and its employees. He was dressed in his official uniform and armed with a .38 caliber pistol for which he had been licensed pursuant to his employment. As petitioner prepared to leave the building, with her supervisor, she had to return to her office to lock up her desk. As petitioner came out of her office, she was assaulted by the guard but managed to break away and run. However, the guard informed her that she was his prisoner, he dangled in her face the keys to the plant which had been issued to him pursuant to his employment. Using the gun, respondent's employee assaulted and raped the petitioner. Roberts subsequently was found guilty of the rape and was sentenced to imprisonment for a term of forty (40) years.

Initially petitioner sought recovery in this action on theories of negligence and failure to perform a non-delegable duty to protect the petitioner, but the issues of negligence were withdrawn and the case submitted to the district court on stipulated facts and the parties' respective motions for summary judgment on the issue of the employer security agency's non-delegable duty to protect petitioner.

After considering the briefs of the parties and hearing extensive argument, the district court granted petitioner's motion for summary judgment. 17a. The oral arguments directed the Court's attention to decisions of the South Carolina Supreme Court, the Restatement of Agency, and decisions of various federal courts. The district judge found that there were no cases directly on point, but found that the respondent security agency should be held liable on two grounds. First, he found there was a line of cases in South Carolina that recognized the non-delegable duty to protect,[1] and held that under these cases the South Carolina court would hold this employer responsible for the failure of the employee properly to dis-

[1] See Restatement of Agency, § 214. The State cases were cited by the panel majority in Part III, 6a, 571 F.2d at 1280; the most analogous case is Buchanan v. Western Union Telegraph Co., 115 S.C. 433, 106 S.E. 159 (1920): "the appearance of [the employer's] messenger . . . opens almost every door. May it admit, with impunity, a thief, a murderer, a rapist?"

charge that duty because of the unlimited power over others given to respondent's employees by virtue of their authorization to use firearms. 16a. In addition, the district court found that the pervasive scheme of regulation contained in the South Carolina Private Detective and Private Security Agencies Act, S.C. Code 40-17-10 et seq. (1976), evinced a legislative intent to require a security agency to be liable for its guard's intentional failure to protect petitioner.[2] 16a. Petitioner has been unable to work since the rape, and has suffered injuries from the rape stipulated by the parties to be Three Hundred Thousand ($300,000.00) Dollars.

The Court of Appeals, by a divided panel, reversed. In its opinion, it recognized that the district court's ruling was "in the mainstream" of modern tort principles, and that the non-delegable duty based on the nature of the employer's business had been recognized in several cases by the South Carolina Supreme Court. 5a-6a, 571 F.2d at 1280. Although the South Carolina courts had never specifically limited this principle to common carriers, the majority of the Court of Appeals did limit the principle to carriers (including communications utilities) and then stated that the majority lacked "a reasoned basis on which to conclude" that this principle would be "extended" to private security agencies in South Carolina. 7a, 571 F.2d at 1281. The majority thought that the extensive regulation of security agencies "indicates a recognition that their activities affect the public interest," but, without citing any South Carolina authority to refute the district judge, simply differed with his interpretation of

[2] Under the statute, S.C. Code § 40-17-130, the employer has the authority of sheriffs, and sheriffs have strict liability for acts of their subordinates under the common law of South Carolina. Teasdale v. Hart, 2 Bay, 173 (1798); Teasdale v. Kennedy, 1 Bay, 322 (1793); State v. Charleston Bridge Co., 113 S.C. 116, 101 S.E. 657 (1919); Rutledge v. Small, 192 S.C. 254, 6 S.E.2d 260 (1939); Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973).

the legislative intent. 8a, 571 F.2d at 1281. The majority also expressly relied for reversal as a "substantial factor," on the fact that the South Carolina Supreme Court had declined to abolish or alter the doctrine of charitable immunity."[3] 8a-9a, 571 F.2d at 1282.

Judge Hall, dissenting, would have affirmed the liability of the security agency "based upon the pervasive scheme of regulation of security guards in South Carolina . . . ." He continued:

> ". . . the voice of all that is right and just cries out for affirmance in this case.
>
> * * * *
>
> "When the defendant took upon itself the responsibility of bringing armed guards into the plant, it, by its own act, made the plaintiff, and all other employees of like situation, subject to their dominance. The defendant made the plaintiff a helpless victim and subjected her to a danger created by it. She was raped and assaulted by the defendant's man. . . . There is no question but that the defendant would have been liable if Roberts had stood by and watched a third person assault the plaintiff. Why then should not the defendant be liable when the guard, the paid protector, becomes the assailant?"

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari because the judgment below is in sharp conflict with the view of the majority of the courts of appeals that, in a diversity case, the interpretation of state law on undecided questions by a federal district judge residing and sitting in that state should be affirmed unless "clearly wrong." The majority opinion also conflicted with this Court's rule set down in *Vandenbark* v. *Owens-Illinois Glass Co.*, 311

[3] This statement was absolutely wrong; see pp. 10-12 infra.

U.S. 538 (1941), which requires an appellate court in a diversity case to apply the state law as it exists at the time of the appellate decision.

I. The majority of the panel below erred in refusing to accord weight to the determination of state law by the district judge, and erred in reversing his determination without finding that it was clearly wrong.

The approach of the majority of the panel below was in sharp contrast to the view taken by the majority of the Courts of Appeals on the proper consideration to be given to the "prediction" of state law by a federal district judge residing and sitting in that state. The objective in a diversity case, of course, is to decide all substantive issues in the same way that the state court would decide those issues. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). However, when the highest court of a state has not addressed a particular point, the federal court must still ascertain the state law, and must "predict" what the state court would decide. 1A Moore, Federal Practice and Procedure ¶ 309[2]. There are many sources to which the federal courts may look when determining state law on an undecided question, including the decisions of lower state courts, the dicta and reasoning of the highest state court, the Restatements of the Law, and the majority rule in other jurisdictions. *Cf. Glassman Construction Co.* v. *Fidelity & Casualty Co. of N.Y.*, 123 U.S. App. D.C. 1, 356 F.2d 340, 342 n. 7 (1966), *cert. denied*, 384 U.S. 987 (1966).

When a district judge has considered these sources of the law of the state in which he resides and sits, the majority of the courts of appeals have held that his interpretation of undecided questions of state law should be followed unless the Court of Appeals is persuaded that the district court is "clearly wrong" or has not reached a "permissible" conclusion in its application of state law principles. *Lomartira* v. *American Auto Ins. Co.*, 371

F.2d 550, 554 (2d Cir. 1967); *Lee Shops, Inc.* v. *Schatten-Cypress Co.*, 350 F.2d 12, 17 (6th Cir. 1965), *cert. denied*, 382 U.S. 980 (1966); *Wisconsin Screw Co.* v. *Fireman's Fund Ins. Co.*, 297 F.2d 697 (7th Cir. 1962);[4] *d'Hedouville* v. *Pioneer Hotel Co.*, 552 F.2d 886, 895 (9th Cir. 1977); *Sade* v. *Northern Natural Gas Co.*, 501 F.2d 1003, 1005 (10th Cir. 1974). The other jurisdictions that have considered the question accord "great weight" or "defer" to the district court's interpretation of state law.[5] *United States* v. *Burnsed*, 566 F.2d 882, 884 (4th Cir. 1977); *Wren* v. *New York Life Ins. Co.*, 493 F.2d 839, 841 (5th Cir. 1974); *Melia* v. *Ford Motor Co.*, 534 F.2d 795, 799 (8th Cir. 1976).

Petitioner submits that the majority rule is the correct one. It gives "special weight" to a federal judge construing the law of his state. *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198, 204-5 (1956). It defers to the opinion of a district judge who resides in and practiced in a state for many years "even if an examination of the state law issue without such guidance might have justified a different conclusion." *Bishop* v. *Wood*, 426 U.S. 341, 345-6 (1976). Such a restriction upon the scope of appellate review makes good sense, for the judges of the district courts " 'are familiar with the intricacies and trends of local law practice.' " 426 U.S. at 346 n.10.

The rule is important. This Court has given attention to defining and delineating the *sources* from which the state law to be applied in a diversity case may be

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[4] But cf. Filley v. Kickoff Publishing Co., 454 F.2d 1288, 1291 (6th Cir. 1972); Buehler Corp. v. Home Ins. Co., 495 F.2d 1211, 1214 (7th Cir. 1974).

[5] The Court of Appeals completely ignored the ruling of the district judge because it felt he should have afforded the issues "fuller treatment." 571 F.2d at 1279 n. 1. But a ruling need not be written. Texarkana v. Arkansas Louisiana Gas Co., 306 U.S. 188 (1939).

drawn. Thus, this Court has instructed the lower courts to place great reliance on the decisions of intermediate appellate courts, *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223 (1940), but not very great reliance on trial courts, *King* v. *Order of Travelers*, 333 U.S. 153 (1948). This Court has made clear that the controlling principles of state law are those most recently announced, even if announced after the district court's decision. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). And this Court has indicated that considered dicta in state decisions should be followed. *Nolan* v. *Transocean Air Lines*, 365 U.S. 293, 295 (1961).

The courts of appeals have clearly considered that the weight to be given the decision of a district judge can determine the outcome of a case[6]—the present case is an excellent example. The Eighth Circuit has recently found that the rule was important to decisions; that circuit changed its rule, so that now that circuit accords less weight to the district judge's determination. Compare *Melia* v. *Ford Motor Co., supra*, with *H. K. Porter Co.* v. *Wire Rope Corp. of America, Inc.*, 367 F.2d 653, 662-63 (8th Cir. 1966). The majority of the appellate courts have construed this Court's statement in *Bernhardt* v. *Polygraphic Company of America, supra*, 350 U.S. at 204, to be a direction that, for appellate purposes, the district judge's rulings should be adopted unless there is some

[6] In a long series of cases, this Court wrestled with the issue of whether a question of state law was "substantive" or "procedural," focusing generally on whether the question would probably have an effect on the outcome of the case. See, e.g., cases applying the state rule, Klaxon Co. v. Stentor Co., 313 U.S. 498 (1941) (choice of law rules); Guaranty Trust v. York, 326 U.S. 99 (1945) (statute of limitations); Bernhardt v. Polygraphic Company of America, supra (compulsory arbitration); and cases following the federal rule, Smith v. Sperling, 354 U.S. 91 (1957) (existence of diversity of citizenship); Byrd v. Blue Ridge Rural Electric Co-op., 356 U.S. 525 (1958) (jury trial); Hanna v. Plumer, 380 U.S. 460 (1965) (Federal Rules of Civil Procedure).

clear reason to find otherwise. If that majority is wrong, this Court should so advise them; if the majority is right, the judgment below should be reversed.

Measured by the standard of reversing only where the district court is "clearly wrong," the majority opinion below was plainly erroneous, and the dissenting member of the panel reached the correct result. First, the majority conceded that there were South Carolina cases and "mainstream" authority, including the Restatement of Agency, that recognized the principle of employer liability applied by the district court. 5a-6a, 571 F.2d at 1280. The correct approach on such questions is to assume that the district judge *accurately* found that the state would follow the majority trend. *d'Hedouville* v. *Pioneer Hotel Co., supra.* Second, the South Carolina Supreme Court has generally adopted a liberal stance toward tort liability, and has recognized liability where justified by sound policy and supported by the trend of modern authority.[7] Third, it was the Court of Appeals, not the

[7] This approach was well stated in the recent decision of Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81, 84-85 (1968), in which a builder-vendor was held liable for defects in construction:

> " 'It is the glory of the common law that it is not a rigid, immutable code. On the contrary, it is a vital, living force that endows with the breath of life a body of practical principles governing human rights and duties. These rules are subject to gradual modification and continuous adjustment to changing social and economic conditions and shifting needs of society. This characteristic is the life blood of the common law. It still exists in its pristine vigor. The spark of life is still burning bright. It has not been extinguished.' "

See Lane v. Trenholm Building Company, infra, 267 S.C. at 503 ("Disparity in the law should . . . not [be] the result of adherence to stale principles which do not comport with current social conditions.") Cf. Spillers v. Griffin, 109 S.C. 78, 95 S.E. 133, 134 (1918), Gossett v. Burnett, 251 S.C. 548, 164 S.E.2d 578, 580 (1968) (Littlejohn, J., concurring). See also, Salladin v. Tellis Pharmacy, 247 S.C. 267, 146 S.E.2d 875, 877 (1966) (privity not required in negligence action against manufacturer); Rutledge v. Doderhoff, 254 S.C. 407, 175 S.E.2d 792 (1970), and Lane v. Trenholm Building Co., 267

district court, that was "clearly wrong" in relying on South Carolina cases on charitable immunity that were not viable authority; see Section II below. Last, the district judge and the dissenting panel member correctly recognized that the "Private Detective and Private Securities Agencies Act" was a regulatory statute remedial in nature, so that it should be construed liberally on behalf of the class of persons to be protected by the statute. Cf. *G-H Ins. Agency, Inc.* v. *The Travelers Ins. Co.*, 241 S.E. 2d 534 (S.C. 1978) (regulatory insurance statute established a standard of conduct required by an insurance carrier toward its agents, enforceable in private suit for breach of contract). A district judge's construction of legislative intent is uniformly accorded the greatest deference. *Bishop* v. *Wood, supra; United States* v. *Burnsed, supra; Wren* v. *New York Life Ins. Co., supra; Sade* v. *Northern Natural Gas Co., supra; Douglas* v. *Beneficial Finance Co. of Anchorage*, 467 F.2d 453, 455 (9th Cir. 1972); *Lomartira* v. *American Auto Ins. Co., supra.*

II. The majority below committed a palpable error by applying legal principles based on state court decisions that had been substantially altered after the judgment of the district court.

The majority of the Court of Appeals also failed to follow this Court's decision in *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). Therefore, the petition should be granted and the judgment reversed.

It is clear that the Court of Appeals was required to apply the controlling state law at the time of the appellate decision. *Vandenbark* v. *Owens-Illinois Glass Co., supra* at 543. However, just as plainly, the majority of the court of appeals ignored the recent state court decision in *Brown* v. *Anderson County Hospital Ass'n, infra,*

S.C. 497, 229 S.E.2d 728 (1976) (vendor of new house makes implied warranty of fitness for intended dwelling use).

which completely undermined the *ratio decendi* of the majority opinion.

The panel majority cited as a "substantial factor" in its holding the "usual deference" of the South Carolina Supreme Court to the state legislature in expanding tort liability. Its principal support for that proposition was two cases in which, the majority asserted, the South Carolina court "declined to abolish or alter the doctrine of charitable immunity . . ."[8] 9a, 571 F.2d at 1282. This statement of the majority was a most glaring error, adhered to on rehearing. The majority cited *Belton* v. *Richland Memorial Hospital*, 263 S.C. 451, 211 S.E.2d 241 (1975), a case involving only governmental immunity,[9] as a case declining to abolish or alter charitable immunity. And it completely ignored the subsequent case of *Brown* v. *Anderson County Hospital Association*, 268 S.C. 479, 488, 234 S.E.2d 873 (1977), which did alter the charitable immunity doctrine substantially by making hospitals liable for reckless acts, and which specifically overruled certain prior cases.[10] Indeed, the latest case

[8] The other cases cited by the majority are even less persuasive of the "deferential" character of the South Carolina court. The South Carolina court did not "decline" to abolish privity of contract in Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 153 S.E.2d 184 (1967). To adhere to the old rule would have meant dismissal of the complaint; instead the matter was remanded for trial. Cf. Smith v. Regina Mfg. Corp., 396 F.2d 826, 838 (4th Cir. 1968), citing *Springfield* for the "liberal posture" of the South Carolina court. In O'Hagan v. Fraternal Aid Union, 144 S.C. 84, 141 S.E. 893 (1928), the court recognized its authority to change the common law rule, and simply was not persuaded that a change would be sound policy.

[9] The headnotes in the *Belton* case refer to charitable immunity, but the opinion itself shows this issue to have been completely irrelevant.

[10] In fact, *Brown* virtually abolished the defense of charitable immunity to tort actions because, in South Carolina, virtually any act of negligence is evidence of recklessness for a jury's considera-

cited by the majority that actually dealt with charitable immunity was *Decker* v. *Bishop of Charleston*, 247 S.C. 317, 147 S.E.2d 264 (1966). Since that decision, the South Carolina court has also excluded the intentional torts of employees from the protection of charitable immunity. *Jeffcoat* v. *Caine*, 261 S.C. 75, 198 S.E.2d 258 (1973).

Likewise, the majority ignored the recent decision of *Broome* v. *Truluck*, 241 S.E.2d 739 (S.C. 1978), in which the South Carolina Supreme Court abrogated a special statutory immunity for architects and contractors. The state court showed no particular deference to the legislature in *Broome*.

If the supposed "deference" of the South Carolina Supreme Court to the state legislature was truly a "substantial factor" in the determination by the majority below of the relevant state law, then that determination is clearly erroneous on the present record of the state law, and the judgment below should be reversed.

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tion. Jowers v. Dupriest, 249 S.C. 506, 154 S.E.2d 922, 925 (1967); Yaun v. Baldridge, 243 S.C. 414, 134 S.E.2d 248, 251 (1965) (recklessness defined as conscious failure to exercise due care).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2398

LOLA RABON,
Appellee,

v.

GUARDSMARK, INC.,
Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Sol Blatt, Jr., District Judge.

Argued November 9, 1977 Decided February 16, 1978

Before WINTER, RUSSELL and HALL, Circuit Judges.

Stephen G. Morrison (John U. Bell, III, Nelson, Mullins, Grier and Scarborough on brief) for Appellant; Dallas D. Ball (Hamond A. Beale on brief) for Appellee.

WINTER, Circuit Judge:

In this diversity action, plaintiff, an employee of the Hewitt-Robins Division of Litton Industries, sued Guardsmark, Inc. (Guardsmark), a corporation engaged in the private security business, for damages resulting from a sexual assault upon her by one of its guards while she was working at a building that Guardsmark had been employed to protect. The district court granted summary judgment as to liability, and awarded plaintiff $300,000, the amount that the parties agreed were her monetary damages. Guardsmark appeals, and we reverse.

I.

The incident out of which this litigation arose occurred on Sunday, January 19, 1975. The facts relating to liability were stipulated: On that date, Melvin Thomas Roberts was employed by Guardsmark as a security guard and he was assigned to the Hewitt-Robins plant to provide protection for the plant and its employees. He was armed with a loaded .38 caliber pistol for which he was duly licensed by the South Carolina Law Enforcement Division pursuant to his employment as a security guard by Guardsmark.

Plaintiff, a payroll clerk, was working late that night together with her supervisor, the general accounting manager at Hewitt-Robins. When the two were leaving the building at the conclusion of their duties, plaintiff discovered that she had left her automobile keys behind and she returned to get them. The supervisor, however, left, so that when plaintiff returned, she and Roberts were the only persons in the building. Roberts forcibly assaulted and raped the plaintiff at gunpoint. Plaintiff claims that the assault rendered her unable to continue her employment and caused her other grievous physical and psychological injuries. She has recovered the Workmen's Compensation benefits fixed by South Carolina law.

Faithful to the precepts of Erie Railroad v. Tompkins, 304 U.S. 64 (1938), the district court looked to the law of South Carolina to determine if Guardsmark was liable to plaintiff. It held that the facts of the case did not bring it within the doctrine of *respondeat superior*, but it concluded, under the law of South Carolina, that a security guard company such as Guardsmark would be held to the higher standard of care which South Carolina law imposed on common carriers. This standard of care was clearly breached, in the opinion of the district court, by the assault upon the plaintiff. The district court's prediction that South Carolina law would treat security guard companies the same as common carriers was based largely upon the extensive statutory regulation of private security companies contained in the South Carolina Private Detective and Private Security Agencies Act, S.C. Code § 56-646 (1975 Cum. Supp.).

II.

The parties agree, as did the district court and as do we, that under the doctrine of *respondeat superior*, as traditionally applied in South Carolina, Guardsmark was not liable for Roberts' intentional tort. Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964); Adams v. South Carolina Power Co., 200 S.C. 438, 21 S.E.2d 17 (1940); Gray v. American Ry. Express Co., 120 S.C. 511, 113 S.E. 322 (1922). The assault by Roberts was manifestly not in furtherance of Guardsmark's business; it was the converse of Guardsmark's purpose—that of providing protection and that for which it was employed. The assault was to effect Roberts' independent purpose, and it was not within the scope of his employment. The mere fact that the tort was committed at a time that Roberts should have been about Guards-

mark's business and that it occurred at the place where Roberts was directed to perform Guardsmark's business does not alter these conclusions. Davenport v. Charleston Western Carolina Ry. Co., 72 S.C. 205, 51 S.E. 677 (1905).

The basis on which the district court found liability,[1] the correctness of which plaintiff urges on appeal, is that South Carolina, as it has done in cases involving common carriers, would hold Guardsmark responsible for an intentional tort of its employee, at least when the tort was committed at the place where Guardsmark directed Roberts to carry out its business and the tort was committed by use of the gun which Guardsmark supplied to enable Roberts to carry out its business. The view of the case taken by the district court is not unknown to the law. The principle it apparently invoked is set forth in Restatement (Second) of Agency § 214 (1958), where it is said:

> Failure of Principal to Perform Non-delegable Duty
>
> A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides

[1] The district court decided the issue of liability in an oral opinion. It gives us little aid in deciding this appeal. It contains no citation of authority except a passing reference to a case that can be identified only by reference to the argument of counsel. Much of what the district court said in its opinion can be interpreted only by its colloquy with counsel prior to its discharge of the jury which had been impanelled to try the case and assess damages before it was known that the district court would decide liability summarily and the parties would agree as to damages. An issue of the novelty, closeness and importance to the parties which this appeal presents was deserving of fuller treatment. While we normally accord significant weight to a district judge's interpretation of the law of the state in which he sits, *see* Williams v. Weyerhauser Co., 378 F.2d 7, 8 (4 Cir. 1967), we cannot do so under the circumstances described.

> the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.[2]

The fact that the view of the law taken by the district court is in the mainstream is only the beginning of the case, not its solution. Under *Erie*, our function in this diversity case is to determine how the case would be decided under the law of South Carolina, not how it might be decided under the law of another, albeit equally respected, jurisdiction, nor under our independent views of the merits of the controversy. Thus our inquiry is directed to South Carolina's recognition of the principle

[2] *Comment* (a) to § 214 is helpful. In pertinent part, it says:

> Unless one has directed a specific tortious act or result, or has been negligent, he is normally *not* responsible for the conduct of others, except that of his agents or servants acting within the scope of their employment. By contract, however, or by entering into certain relations with others, a person may become responsible for harm caused to them by conduct of his agents or servants not within the scope of employment; the extent of this liability depends upon the duty assumed. Also, if one contracts for a result to be achieved, in accomplishing which there is a peculiar likelihood of harm to others, he may become liable for the conduct of those not his agents or servants. There are three forms of the duty of protection. First, a person may have a duty to protect another which can be performed either by exercising care personally in protecting the other or by exercising care in the employment of an independent contractor to protect the other. Secondly, there may be a duty to protect another at all hazards, a duty which is not fulfilled unless the other is protected and which is not satisfied by the use of care. This duty normally exists only when undertaken by contract. Thirdly, *one may have a duty to see that due care is used in the protection of another, a duty which is not satisfied by using care to delegate its performance to another but is satisfied if, and only if, the person to whom the work of protection is delegated is careful in giving the protection.* In this third class, the duty of care is non-delegable. (Emphasis added.)

As will be shown in the text, plaintiff's theory of liability is that this is a case to which Guardsmark, from the nature of its business, had a non-delegable duty of due care to plaintiff.

of non-delegable duties, whether South Carolina has recognized a non-delegable duty of due care on the part of a private security guard enterprise and, if not, what is our informed prediction as to whether South Carolina would recognize a non-delegable duty of due care on the part of persons engaged in such an activity.

III.

South Carolina has recognized the non-delegable duty exception to the general rule of *respondeat superior* in a number of cases. Jones v. Atlantic Coast Line R.R., 108 S.C. 217, 94 S.E. 490 (1917); Buchanon v. Western Union Telegraph Co., 115 S.C. 433, 106 S.E. 159 (1920); Matheson v. American Telephone & Telegraph Co., 137 S.C. 227, 135 S.E. 36 (1926). A precise understanding of the rationale of these cases is not free from doubt because the basis of decision of each is not clearly articulated. Nevertheless, we note that the defendant in each was a common carrier[3] and was therefore subject to a stringent standard of care toward those with whom it dealt.[4] Indeed, the rule in South Carolina, as in other

[3] Prior to its repeal in 1971, Article IX, § 3 of the Constitution of South Carolina (1895), grouped telephone and telegraph companies with common carriers in respect to liability.

[4] W. Prosser, Law of Torts § 70, p. 465 (1971), describes the so-called "common carrier" exception to the usual rule that a master is not liable for the "frolics or detours" of his servant, as follows:

> Even where the servant's ends are entirely personal, the master may be under such a duty to the plaintiff that responsibility for the servant's acts may not be delegated to him. This is true in particular in those cases where the master, by contract or otherwise, has entered into some relation requiring him to be responsible for the protection of the plaintiff. The employees of a carrier, for example, would be under a duty to a passenger to exercise reasonable care to protect him against assaults on the part of third persons, even for personal motives, and they are not less under a duty to protect him against their own assaults, which is the duty of the master as well. It follows that the master will be liable even for such entirely personal torts as the rape of a passenger. The same is true of innkeepers and hospitals. (Footnotes omitted.)

jurisdictions, is that a common carrier owes its patrons the highest degree of care. *See, e.g.*, Poliakoff v. Shelton, 193 S.C. 398, 8 S.E.2d 494 (1940). Plaintiff argues that the principle supporting the imposition of this higher standard of care upon common carriers also applies to this case. But our examination of the South Carolina cases involving common carrier liability indicates that while the standard of liability is settled, the reasons for its adoption are not clear.[5] As a consequence, we lack a reasoned basis on which to conclude that the South Carolina Supreme Court would be persuaded to extend it to private security agencies.

We cannot agree with the district court that the South Carolina Private Detective and Private Securities Agencies Act, S.C. Code § 56-646 (1975 Cum. Supp.), places Guardsmark in the same category as a common carrier with respect to liability to the public for unauthorized acts of its servants. That statute merely establishes a licensing scheme. It addresses the manner of applying for a license, bonds, fees, registration of employees, firearms permits, the police powers of licensees,

[5] Those South Carolina cases that discuss the higher standard of care of common carriers seem to consider the principle as axiomatic. Cases from other jurisdictions suggest at least three reasons for the extraordinary liability of common carriers. First, the contract of passage between the carrier and the passenger is said to contain an implied assurance that the passenger will be transported safely. *See, e.g.*, New Jersey Steamboat Co. v. Brockett, 121 U.S. 637 (1887); Co-op Cab Co. v. Singleton, 19 S.E.2d 541 (Ga. 1942); Hairston v. Atlantic Greyhound Corp., 18 S.E.2d 166, 169 (N.C. 1942). Second, common carriers are thought to be charged with public responsibilities; the stringent standard of care is therefore imposed as a matter of public policy. *See, e.g.*, Matusda v. Hammond, 137 P. 328, 330 (Wash. 1913). Finally, it has been suggested that the special duties of the common carrier arise from the fact that the passenger has entrusted his safety, as a bailor entrusts his goods, to the custody and safekeeping of the carrier. *See* Vanderhule v. Bernstein, 136 N.Y.S.3d 95, 103 (1954). We cannot say which of these theories, if any, explains the South Carolina decisions.

and the suspension or revocation of license. The civil liability of private security agencies is not mentioned.

True, the fact that the South Carolina legislature thinks it desirable to license private security agencies indicates a recognition that their activities affect the public interest. But one cannot infer from that recognition an intention to impose on them a higher standard of civil liability than that to which ordinary business enterprises are held. It is equally plausible to suppose that the legislature considered the licensing scheme an adequate safeguard for the public interest. Thus, this regulatory scheme does not evidence the legislative intention that the district court ascribed to it.

Our conclusion that the mere existence of the statute does not justify the extension of the common carrier standard of care to private security agencies is supported by the decision in Apex Smelting Co. v. Burns, 175 F.2d 978 (7 Cir. 1949), which exonerated a detective agency from liability for arson perpetrated by one of its guards, although its business was subject to licensing and regulation. When the licensing act was amended to impose liability on the detective agency-employer for the "good conduct" of its employees, the opposite result was reached when a security guard set a fire. Stewart Warner Corp. v. Burns International Security Services, Inc., 353 F.S. 1387 (N.D. Ill. 1973).

IV.

A substantial factor in our decision is the usual deference on the part of the Supreme Court of South Carolina to the South Carolina legislature in matters involving a change in the common law. Plaintiff's right to recovery may be sustained only by extending the exception to the traditional rule of *respondeat superior* that a principal is not liable for his servant's unauthorized

intentional tort in derogation of the common law. But the South Carolina courts have been reluctant to expand tort liability. The Supreme Court of South Carolina has twice declined to abolish or alter the doctrine of charitable immunity, although it expressed no doubt about its authority so to do. Belton v. Richland Memorial Hospital, 263 S.C. 451, 211 S.E.2d 241 (1975); Decker v. Bishop of Charleston, 247 S.C. 317, 147 S.E.2d 264 (1966). It took a similar position with respect to the necessity of the privity of contract requirement in products liability cases in Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 153 S.E.2d 184 (1967).[6] *See, also*, McHugh v. Carlton, 369 F.S. 1271 (D. S.C. 1974); O'Hagan v. Fraternal Aid Union, 144 S.C. 84, 141 S.E. 893 (1928).

V.

To summarize: Plaintiff's right to recovery is barred by operation of the rule of *respondeat superior* since the assault by Roberts was neither in furtherance of Guardsmark's business nor within the scope of Roberts' employment. We do not think that this case may be treated as an exception to this rule under existing South Carolina precedents or statutes, and we do not think that the South Carolina Supreme Court would reach a different conclusion. It follows that the judgment from which the appeal is taken is

REVERSED.

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[6] The legislature subsequently abolished the requirement by enacting S.C. Code § 77-371-373 (1975 Cum. Supp.).

HALL, Circuit Judge, dissenting:

While I concede that *Apex Smelting Co.* v. *Burns*, 175 F.2d 978 (7th Cir. 1949), the subsequent amendment of the licensing statute for detective agencies, and the subsequent interpretation favoring liability following the legislative amendment in *Stewart Warner Corp.* v. *Burns International Security Services, Inc.*, 353 F. Supp. 1387 (N.D. Ill. 1973), are analogous to the factual situation presented in the instant appeal, nevertheless they are of course not controlling. The South Carolina Supreme Court has held that, "[t]he decisions of courts from other jurisdictions are, of course, only persuasive authority. . . ." *South Carolina State Highway Department* v. *Wilson*, 254 S.C. 360, 175 S.E.2d 391, 395 (1970).

Accordingly, I would hold as did the district judge that liability was properly imposed on Guardsmark based upon the pervasive scheme of regulation of security guards in South Carolina under the South Carolina Private Detective and Private Securities Agencies Act, S.C. Code §§ 56-646.1 through 646.17 (1975 Cum. Supp.).

Furthermore, the voice of all that is right and just cries out for affirmance in this case. The trial judge clearly recognized that the plaintiff had been wronged by the defendant even though he had difficulty in finding precedent for his ruling. We have passed the point in the law where there must be a writ for every right and we must, if necessary, articulate new law to cover new circumstances.

Here, the plaintiff did not ask for the protection of guards, and could not have elected to refuse that protection. When the defendant took upon itself the responsibility of bringing armed guards into the plant, it, by its own act, made the plaintiff, and all other employees of like situation, subject to their dominance. The defendant made the plaintiff a helpless victim and subjected her

to a danger created by it. She was raped and assaulted by the defendant's man. Roberts was not a fellow employee. He was the plaintiff's protector. There is no question but that the defendant would have been liable if Roberts had stood by and watched a third person assault the plaintiff. Why then should not the defendant be liable when the guard, the paid protector, becomes the assailant?

I would affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2398

[Filed Apr. 14, 1978]

LOLA RABON,

Appellee,

versus

GUARDSMARK, INC.,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Sol Blatt, Jr., District Judge.

Upon consideration of the petition for rehearing and suggestion for rehearing en banc and the motion of the South Carolina Trial Lawyers Association, Inc., for leave to file amicus brief and for an extension of time within which to file the brief, and no judge having requested a poll on the suggestion for rehearing en banc,

IT IS ORDERED that the petition for rehearing is denied.

IT IS FURTHER ORDERED that the motion of the South Carolina Trial Lawyers Association, Inc., for leave to file amicus brief and for an extension of time within which to file the brief is denied.

Entered at the direction of Judge Winter with the concurrence of Judge Russell. Judge Hall dissents from the denial of rehearing and denial of the motions.

A True Copy,

William K. Slate, II

By /s/ Faye L. Smith
Deputy Clerk

For the Court,

/s/ William K. Slate, II
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 76-410

LOLA RABON,

Plaintiff,

—versus—

GUARDSMARK, INC.,

Defendant.

September 16, 1976
Columbia, South Carolina

BEFORE:

HONORABLE SOL BLATT, JR.,
UNITED STATES DISTRICT COURT
AND A JURY.

APPEARANCES:

DALLAS BALL, ESQUIRE,
For the Plaintiff.

STEPHEN G. MORRISON, ESQUIRE
For the Defendant.

TRANSCRIPT OF PROCEEDINGS

BY: DOREEN F. GREENSTEIN,
OFFICIAL COURT REPORTER

[2] THE COURT: Thank you. Please be seated.

Gentlemen, I have read the Palles Case you referred to. Of course, to start with, that case involved a landlord-tenant relationship. The abrogating or the enlargement of that liability is not regulated by statute so minutely as is the private detective service business. So I do not believe that that case would be as strong as if I were, in fact, finding legislative intent in the detective statutes which abrogate or modify the common law.

Let the record show that I believe that when the South Carolina Supreme Court is faced with the issue with which we are faced with here, when and if the South Carolina Supreme Court is faced with this issue, they would find as a part of the common law that the type of relationship here involved would require a higher degree of care than the normal principal and agent and master and servant relationship and that the doctrine of respondeat superior would apply and would require and hold the servant or principal responsible for any act of the agent when the agent did not act with due care, regardless of whether or not the agent at the time was acting in furtherance of his master's business.

Now, I find that the common law of [3] South Carolina and the common law generally makes a master in one group of cases responsible for the acts of his servant or principal for its agent only when agent is acting in furtherance of the master's business. If that theory were to be followed, I would grant summary judgment for the defendant here.

I find another line of cases which hold that the master is responsible for the neglect of the agent or when the servant does not use due care. These are common law cases.

In the common carrier instance, regardless of the question of whether or not the agent or the servant is

acting in furtherance of the master's business, I find and I believe that if the Supreme Court of South Carolina were faced with the issue here, that they would apply at least as strict a liability on the detective, on the private detective service. The common terminology for it is private security business. I believe the Supreme Court of South Carolina would apply at least as strict a liability on the detective as on the common carrier. As a matter of fact, I think possibly they should be given a more strict accountability; and my prior conversations to the statute, I believe, abrogate or modify the common law. They so strictly regulate the private security business and I find they give such unlimited power [4] to those who meet the qualifications that if it were necessary this Court might place this type of relationship under the strict test liability forum, that is, that they would be responsible for the conduct of their employee under all circumstances, whether they were even on the premises, because they were given a gun and the right to carry a gun under the statute and they are given the dominant and superior power over the average person with whom they would be involved. I am trying to say that in this case it does not necessitate my going that far. In this case the guard was at his place of business where his duties required him to be. And I think it is not necessary to place strict liability on the defendant; that because of the authority given the defendant and because the defendant is so regulated and its employees are so regulated that when the Supreme Court of South Carolina is faced with that situation that they would hold that the common law itself would require the respondeat superior doctrine to apply to any act of the defendant's employee that took place while the servant or the agent was on the premises to be guarded and at a place where his business relationship with his employer required him to be.

Now, as the Court said in Palles in order to abrogate the common law by virtue of the statute there must be some showing of legislative intent in the [5] statute. There is no abrogation of the common law relationship in my holding because I think that the common law of South Carolina is as I have held. I think the Supreme Court of South Carolina, as best I can determine, would so hold. I am not basing my decision on this. I believe that the relationship of those in the security business and their employees and the state is so well regulated that I would find if it was necessary and as an additional ground and I do find that there is legislative intent in this statute to place the type of liability on those involved in the security business placed on the defendant here.

I find that the common law, while the South Carolina Supreme Court has never decided the issue exactly, but I find that when the issue is presented to them I would predict that they would find that the master would be responsible for the conduct of the employee or servant when it took place on the premises where the servant is placed because of his relationship with the master.

Second, as an additional ground for my ruling, I find that this statute does indicate a legislative intent by its regulation of this business to place that type of responsibility on those engaged in the private security business.

[6] For those reasons I will grant the plaintiff's motion for summary judgment and refuse the defendant's motion.